

NO. 82-1156

In the
Supreme Court of the United States

OCTOBER TERM, 1982

TELEDYNE MOVIBLE OFFSHORE, INC.
and ARGONAUT INSURANCE COMPANY

Appellants,

v.

DAN THOMPSON

Appellee,

ON APPEAL FROM THE
SUPREME COURT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Where the validity of a specific state statute is not questioned in proceedings before state trial or appellate courts, nor in the Jurisdictional Statement of appellants filed with this Court, does the jurisdiction of the Supreme Court of the United States attach on appeal?

2. Where the highest state court has approved the application of a state workmen's compensation scheme to injuries arising out of operations conducted on the outer continental shelf, is there a substantial federal question involved?

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The appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of the State of Louisiana, on the following grounds:

A. This case is not within the appeal jurisdiction of this court;

B. The appeal does not present a substantial Federal question.

STATEMENT

The plaintiff below, Dan Thompson, (hereinafter the appellee) instituted suit in Louisiana State District Court

against the appellants, Teledyne Movable Offshore, Inc. and its workmen's compensation insurer, Argonaut Insurance Company, for state workmen's compensation benefits arising out of injuries sustained by appellee while working on an immovable platform rig located on the outer continental shelf approximately four miles from the shoreline of the State of Louisiana.

Appellants filed in the trial court an Exception of Lack of Jurisdiction Over the Subject Matter of the Action. A hearing was held on September 28, 1981, and the Exception was thereafter denied by the trial court on November 25, 1981. Written reasons were assigned.

Appellants applied to the Third Circuit Court of Appeal, State of Louisiana, for writs of certiorari on December 16, 1981. On January 6, 1982, the Third Circuit Court of Appeal, State of Louisiana, granted a writ to the appellants, made the writ peremptory, sustaining the appellants' Exception to Lack of Subject Matter Jurisdiction and dismissing appellee's suit at his cost.

On March 23, 1982, appellee applied to the Supreme Court of the State of Louisiana, for a writ of certiorari. The State Supreme Court granted a writ to appellee on February 19, 1982. Thereafter, the Supreme Court of the State of Louisiana reversed the holding of the Third Circuit Court of Appeal, State of Louisiana, ruling that Louisiana state courts have subject matter jurisdiction over claims by employees against employers for compensation benefits in the case of injuries arising out of operations on the outer continental shelf. Appellants argued that the application of Louisiana's state workmen's compensation laws was precluded by the Outer Continental Shelf Lands Act (hereinafter referred to as OCSLA) and the Longshoremen

and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA) but that argument was rejected by the state's highest court. Rehearing was timely applied for, but was denied.

In all proceedings below, appellants generally attacked the exercise of jurisdiction by Louisiana courts over the subject matter of the proceeding. Appellants did not question the validity of a specific Louisiana statute on grounds of repugnance to the Constitution, treaties, or laws of the United States. Appellants questioned the application by the Louisiana courts of Louisiana's workmen's compensation laws to injuries arising out of operations on the outer continental shelf. Appellants, in their Jurisdictional Statement, allege that 28 U.S.C., Section 1257(2) provides the basis for their appeal to this Honorable Court, yet appellants contend that the "statute involved" is 43 U.S.C., Section 1333(b). Appellants failed to designate, even in their Jurisdictional Statement, a state statute the validity of which is in question as repugnant to federal law.

ARGUMENT

I.

THE FAILURE OF APPELLANTS TO PLACE AT ISSUE THE VALIDITY OF A SPECIFIC STATE STATUTE AS REPUGNANT TO THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES.

Appellants seek to invoke the appellate jurisdiction of this Honorable Court under the provisions of 28 U.S.C., Section 1257(2) which provides:

Section 1257

(2) "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The appellants designate 43 U.S.C., Section 1333(b), which is a provision of the Federal Outer Continental Shelf Lands Act, as "the statute involved." (Appellants' Jurisdictional Statement, page 2) Appellants are actually complaining of the application by the Louisiana State Supreme Court of the Louisiana workmen's compensation laws to injuries occurring on immovable platforms on the outer continental shelf. Under the literal language of 28 U.S.C., Section 1257, no appellate jurisdiction exists.

II.

THE DECISION OF THE SUPREME COURT OF THE STATE OF LOUISIANA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

The appellants contend the application by a state of its workmen's compensation scheme to injuries arising out of operations on fixed platforms on the outer continental shelf is precluded by the Longshoremen and Harbor Workers Compensation Act as applied through the Outer Continental Shelf Lands Act. Appellants further argue a "plethora of conflicts are certain to arise." (Appellants' Jurisdictional Statement, page 7) Appellee notes that the illustrations of potential conflicts posed by appellants are those same illustrations presented to this Court in earlier

cases. Appellants' illustrative list of potential conflicts briefly summarized are as follows:

- A. The possibility of double recovery;
- B. The possibility of subjecting employers to liability greater than that under the Federal Compensation Act;
- C. The extension of third party actions against employers;
- D. Possible limitation of third party tort actions;
- E. Exposure by employers to greater penalties and attorney's fees; and
- F. Potential problems with settlement of compensation claims under state and federal systems.

In *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715 (1980), this Court considered some of the more practical aspects of the concurrent application of state and federal compensation remedies. The possibility of double recovery urged by the appellants herein and in *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, *supra*, was not novel, the same argument having been raised in *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196, L.Ed.2d 368 (1962). In *Calbeck* and *Sun Ship*, the Court held:

"There is no danger of double recovery under concurrent jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme."

The Court also rejected the defendant-employers' arguments with respect to the possibility of subjecting employers to liability greater than that under the Federal act or the possibility of employers paying higher compensation benefits to employees than those provided by Federal law. The Court found "no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits." *Sun Ship, Inc. v. Commonwealth of Pennsylvania, supra*. Appellants now raise anew the above arguments which have been considered and ruled upon by this Honorable Court.

Appellants seek to point out additional problems with the concurrent application of federal and state compensation remedies urging that employees will undoubtedly attempt to maintain unseaworthiness actions against support vessel owners, although these actions are proscribed by 33 U.S.C., Section 905(b). Thus, according to appellants, the employer is subjected to greater exposure than that provided under the federal act. Alternatively, appellants contend the platform worker employed by a contractor (or by a sub-contractor) may be precluded from bringing a third party tort action against the general owner (or general contractor) by certain provisions of the Louisiana Workmen's Compensation Act. La.R.S. 23:1061. In either case, the law on the outer continental shelf is quite clear that federal law controls and state law is to be adopted as federal common law only where state law is applicable and *not inconsistent* with federal law.

Appellants argue it is "not enough to say that where the statutes conflict, the federal statute will prevail." (Appellants' Jurisdictional Statement, page 10) Appellants attempt to support this contention by alleging that "the number of potential conflicts is so large, that judicial

energy and employers' resources will necessarily be expended in the judicial process of blending the two laws together." (Appellants' Jurisdictional Statement, page 10) Obviously, this Court did not find the potential for conflict and the excessive expenditure of judicial energy so great as to deter the Court from "blending" the two laws together in *Calbeck, supra*, and *Sun Ship, supra*.

Virtually all potential conflicts alleged by appellants have been recognized, considered and dismissed by this Court as insufficient in magnitude to prohibit the concurrent application of state and federal workmen's compensation remedies.

The ruling below by the Supreme Court of the State of Louisiana clarified what had previously been a state of jurisprudential confusion in the State of Louisiana. The intermediate state appellate courts labored for years under the erroneous assumption that the state courts had no subject matter jurisdiction over claims arising on the outer continental shelf. This belief was based on two misconceived premises:

1. The application of the Longshoremen & Harbor Workers Compensation Act was exclusive of state workmen's compensation remedies; and
2. That federal courts had exclusive subject matter jurisdiction in cases of injuries arising on the outer continental shelf.

In *Sun Ship, Inc. v. Commonwealth of Pennsylvania, supra*, and *Gulf Offshore Company v. Mobile Oil Corporation*, 101 S.Ct. 2870 (1981), this court provided direction for the Louisiana courts in the exercise of their state court jurisdiction.

In *Sun Ship*, this Court held that a state may properly apply its workmen's compensation scheme to land based injuries that fall within the coverage of the LHWCA, as amended in 1972. Appellants suggest that *Sun Ship* has no application herein inasmuch as appellee's injury occurred on the outer continental shelf some four miles from the shore's edge. However, in *Rodrigue v. The Aetna Casualty & Surety Company, et al.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), the Court held that immovable platform oil rigs were merely artificial islands located on the outer continental shelf and were to be treated as federal enclaves in an upland state. *Sun Ship* clearly applies through the holding in *Rodrigue, supra*, to immovable platform oil rigs such as the one on which appellee was injured.

In *Gulf Offshore, supra*, this Court interpreted the language of 43 U.S.C., Section 1349(b)(1) which granted to United States District Courts, "original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf..." In *Gulf Offshore*, the court noted:

"It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action. *United States v. Bank of New York Company*, 296 U.S. 463, 479 (1936)."

This court went on to hold that "the OCSLA did not intend federal courts to exercise *exclusive* subject matter jurisdiction over injuries arising on the outer Continental Shelf." (Emphasis added) *Gulf Offshore v. Mobil Oil Corporation, supra*.

This Court having removed the presumed impediments to state court jurisdiction, the Supreme Court of the State of Louisiana properly ruled the appellee herein has the right to proceed in state court under the state workmen's compensation statute.

Appellants further maintain that the issue at bar is not "preemption" but whether Congress intended to borrow state law as "surrogate" federal law. It is true that 43 U.S.C., Section 1333(a)(1) provides that all law applicable to the outer continental shelf is federal law and that state law is adopted as federal common law when "applicable and not inconsistent" with the federal law. Appellants apparently argue that state compensation schemes are either inapplicable or inconsistent with the LHWCA. However, the ruling of this Court in *Sun Ship, supra*, was explicit in finding that state and federal compensation remedies are compatible and that concurrent jurisdiction for state and federal compensation laws is in no way inconsistent with federal policy.

The applicability of the state's workmen's compensation statutes to the facts herein is apparent in light of the holding of this Court in *Potomac Electric Power Company v. Director*, 101 S.Ct. 509 (1980). Appellee alleged in his original petition filed in the State District Court of Louisiana that he had become permanently disabled from performing his duties as a roustabout due to a crushing injury to the middle finger of his right hand. In *Potomac*, the United States Supreme Court reviewed the language of the LHWCA and held that a literal interpretation of the Act precluded recovery under permanent and partial disability provisions where the injury was to a scheduled member, finding that such recovery had not been authorized by Congress. After reaching this decision, this Court remarked

that such an inequitable result should "provide a persuasive justification for a legislative review of the statutory compensation schedule." This Court went on to suggest that perhaps Congress should "re-examine the schedule of permanent and partial disability benefits more frequently than every half century." The Court noted its sympathy for the claimant but stated that "sympathy is an insufficient basis for approving a recovery that Congress *has not authorized*." (Emphasis added) The instant factual situation is one for which Congress has not legislated an equitable remedy. To the contrary, a federal statutory void exists, for which Louisiana's workmen's compensation statute does provide a remedy. (See La. R.S. 23:1221(3))

The decision of the Supreme Court of the State of Louisiana is clearly correct and no substantial federal question has been presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Supreme Court of the State of Louisiana be affirmed.

Respectfully Submitted,

ANTOON, DALRYMPLE & BECK

BY _____

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ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Dismiss or Affirm has been served on the defendants and appellants, Teledyne Movable Offshore, Inc. and Argonaut Insurance Company, through their counsel of record, Joel E. Gooch, by depositing same in a U.S. Post Office with first class postage prepaid, addressed to Joel E. Gooch, P.O. Drawer 3768, Lafayette, Louisiana, 70502, this _____ day of _____, 1983.

Robert L. Beck, Jr.